

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BILLUPS, INC., an Oregon
corporation,

3:20-cv-00891-BR

OPINION AND ORDER

Plaintiff,

v.

AMBASSADOR TECHNOLOGIES, INC.
dba BYPROXIE, a foreign
corporation; HOMETOWN HEART,
a foreign corporation; EAZE
TECHNOLOGIES INC., a foreign
corporation; and HERBAN
INDUSTRIES CA LLC, a foreign
limited liability company,

Defendants.

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BROWN, Senior Judge.

This matter comes before the Court on the Motion (#20) of Eaze Technologies Inc., and Hometown Heart (HTH) to Dismiss the First Amended Complaint. The Court concludes the record is sufficiently developed, and therefore, oral argument would not be helpful to resolve these Motions.

For the reasons that follow, the Court **GRANTS** the Motion of HTH and Eaze and **DISMISSES** Plaintiff's First Amended Complaint as to HTH and Eaze for lack of personal jurisdiction **without prejudice**.

BACKGROUND

The following facts are taken from Plaintiff's First Amended Complaint (FAC) and the parties' filings related to the Motion to

Dismiss of HTH and Eaze and are taken as true unless otherwise noted.

Plaintiff Billups, Inc., is an Oregon corporation "that specializes in the placement of certain Out of Home (OOH) and other media advertising for . . . companies and advertising agencies." FAC at ¶ 1.

Defendant Ambassador Technologies, Inc. dba ByProxie (ByProxie) is an advertising agency registered in Delaware and has its principal place of business in California. ByProxie is not registered with the Oregon Secretary of State to conduct business in Oregon.

Defendant Herban Industries CA LLC is a limited liability company registered and headquartered in California. Herban sells and delivers cannabis provided by Defendant HTH under the brand names "CaliChill" and "Chill." Herban is not registered with the Oregon Secretary of State to conduct business in Oregon.

Defendant HTH is a cannabis dispensary registered and headquartered in California. At all relevant times HTH sold cannabis exclusively through Herban's online platform. Until February 2020 HTH and Herban were jointly owned by DionyMed, Incorporated,¹ a Canadian corporation.

Defendant Eaze Technologies, Inc., "is a Delaware

¹ DionyMed is not a party to this action and "is now insolvent and in receivership." FAC at ¶ 4.

corporation operating in California.” Decl. of David Adams at ¶ 3.

In April 2019 DionyMed “used HTH and Herban in tandem for one principal purpose: to sell and deliver cannabis online in California. HTH, as a dispensary in California, would sell the cannabis, while Herban would provide an online user-facing platform called Chill or Calichill, whereby users could order the delivery of HTH’s cannabis.” FAC at ¶ 9. Plaintiff alleges at some point that

HTH and Herban appointed ByProxie to act as their advertising agent. Specifically, HTH and Herban appointed ByProxie to arrange and execute an advertising campaign, wherein their advertising content . . . would be displayed on various OOH sites in California and on other media. On information and belief, ByProxie was duly authorized to sign contracts on behalf of HTH and Herban in furtherance of their advertising campaign.

FAC at ¶ 10. Defendants HTH and Eaze dispute these allegations.

On April 25, May 1, May 20, June 25, June 26, and September 17, 2019, ByProxie and Billups entered into Media Authorizations in which ByProxie authorized Plaintiff “to act as [ByProxie’s] agent in placing out of home advertising with owners and other applicable parties, entering into contracts and schedules for placement of OOH on behalf of [ByProxie], and directing the production and installation of advertising media.” FAC Exs. A at 8, B at 3, C at 7, D at 8, E at 9, F at 4. The Authorizations noted “[t]he parties acknowledge that [ByProxie]

may be acting as agent to an advertising customer (Advertiser), and that *if so*, Advertiser shall guarantee [ByProxie's] payment of all charges, expenses and costs arising out of all contracts and/or schedules with OOH owners." FAC Exs. A at 8, B at 3, C at 7, D at 8, E at 9, F at 4 (emphasis added).

Plaintiff alleges it "fully performed under" all of the Authorizations, but ByProxie paid only part of the funds due under the April 25, May 1, and May 20, 2019, Authorizations and did not pay any of the funds due under the June 25, June 26, and September 17, 2019, Authorizations.

On October 29, 2019, DionyMed was "placed into receivership in Canada." FAC at ¶ 35. Herban and HTH, however, "continued to conduct business." FAC at ¶ 35.

In February 2020 DionyMed sold HTH to Eaze, and Herban's online user-facing platform "ceased operation." FAC at ¶ 36. Plaintiff asserts Eaze, "having acquired HTH in 2019,"² has assumed HTH's liabilities and, as such, is liable for HTH's contractual obligations to Plaintiff." FAC at ¶ 37. "In the alternative, Eaze's purchase of HTH's assets has resulted in either a consolidation or merger of HTH with Eaze, or a continuation of HTH's business. As such, Eaze is liable for HTH's debts under Oregon law." FAC at ¶ 38. Defendants Eaze and

² It appears from the remaining allegations in the First Amended Complaint that 2019 is a scrivener's error because Eaze acquired HTH in February 2020.

HTH dispute both of these allegations.

On June 3, 2020, Plaintiff filed a Complaint in this Court and brought claims for breach of contract and unjust enrichment against ByProxie, HTH, and Eaze.

On September 18, 2020, Plaintiff filed a First Amended Complaint in which it added Herban as a defendant and attached the six Media Authorizations at issue.

On October 19, 2020, Defendants HTH and Eaze filed a Motion to Dismiss the claims against them in Plaintiff's First Amended Complaint on the ground that this Court lacks personal jurisdiction over HTH and Eaze.

On December 9, 2020, the Court entered an Order of Default as to Herban.

On January 5, 2021, the Court entered an Order of Default as to ByProxie.

STANDARDS

When "the existence of personal jurisdiction is challenged and the defendant appears specially to contest its presence in the jurisdiction, the plaintiff has the burden to come forward with some evidence to establish jurisdiction." *Dist. Council No. 16 of Intern. Union of Painters & Allied Trades, Glaziers, Architectural Metal & Glass Workers, Local 1621 v. B&B Glass, Inc.*, 510 F.3d 851, 855 (9th Cir. 2007) (citing *Schwarzenegger v.*

Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004)). "The court may consider evidence presented in affidavits to assist it in its determination and may order discovery on the jurisdictional issues." *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (citing *Data Disc, Inc. v. Sys. Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). If the court makes a jurisdictional decision based only on pleadings and affidavits submitted by the parties and does not conduct an evidentiary hearing, the plaintiff need make only a *prima facie* showing of personal jurisdiction. *B&B Glass*, 510 F.3d at 855 (citation omitted). When determining whether the plaintiff has met the *prima facie* showing, the court must assume the truth of uncontroverted factual allegations in the complaint. *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002). See also *In re Boon Glob. Ltd.*, 923 F.3d 643, 650 (9th Cir. 2019) ("When the party invoking jurisdiction does not ask for jurisdictional discovery . . . [the court] must evaluate whether the pleadings and affidavits establish a *prima facie* showing of jurisdictional facts. Although the party asserting jurisdiction is required only to establish a *prima facie* showing of jurisdictional facts, the standard is not toothless. The party asserting jurisdiction cannot simply rest on the bare allegations of its complaint; however, uncontroverted allegations in the complaint must be taken as true.") (quotations omitted)).

A court's personal jurisdiction over a particular defendant is proper either as "general" or "specific" personal jurisdiction. "General jurisdiction exists when the defendant's contacts with the forum state are so 'continuous and systematic' as to render the defendant essentially 'at home' in that forum." *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 602 (9th Cir. 2018) (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014)).

Even if the district court does not have general jurisdiction over the defendant, the court may have specific jurisdiction "if the controversy is sufficiently related to or arose out of the defendants' contacts with the forum." *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995). See also *Jine v. OTA Franchise Corp.*, No. SACV2000769JVSKEsx, 2020 WL 7129374, at *4 (C.D. Cal. Sept. 11, 2020) ("A defendant is subject to specific personal jurisdiction only if a controversy arises out of or is sufficiently related to the defendant's contacts with the forum state.").

DISCUSSION

As noted, HTH and Eaze move to dismiss the claims against them in Plaintiff's First Amended Complaint on the ground that this Court does not have personal jurisdiction over them. Although it is not entirely clear, it appears from Plaintiff's

response to the Motion to Dismiss that Plaintiff does not contend this Court has general jurisdiction over HTH and Eaze but instead asserts the Court has specific jurisdiction over HTH and Eaze.

I. Specific Jurisdiction Standards

"Personal jurisdiction over a nonresident defendant is tested by a two-part analysis. First, the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute. Second, the exercise of jurisdiction must comport with federal due process." *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1094 (9th Cir. 2009) (quotations omitted). "Oregon Rule of Civil Procedure 4(L) extends jurisdiction to the limits of due process under the United States Constitution." *Rubicon Glob. Ventures, Inc. v. Chongqing Zongshen Grp. Imp./Exp. Corp.*, 630 F. App'x 655, 657 (9th Cir. 2015). *See also Pac. Reliant Indus., Inc. v. Amerika Samoa Bank*, 901 F.2d 735, 737 (9th Cir. 1990) ("Oregon's long-arm statute confers jurisdiction to the outer limits of due process under the United States Constitution."); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2800 n.8 (2011) ("State long-arm provisions allow the exercise of jurisdiction subject only to a due process limitation in . . . Oregon.").

"The due process analysis, in turn, centers on whether [a nonresident defendant] has 'certain minimum contacts' with [the forum state], such that the exercise of jurisdiction 'does not

offend traditional notions of fair play and substantial justice.'" *Fiore v. Walden*, 688 F.3d 558, 573 (9th Cir. 2012) (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). See also *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (same).

As noted, a court has specific jurisdiction over a defendant when "the controversy [was] sufficiently related to or arose out of the defendants' contacts with the forum." *Omeluk*, 52 F.3d at 270. The Ninth Circuit applies the following three-part test to determine whether a district court constitutionally may exercise specific jurisdiction over a nonresident defendant:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

Freestream Aircraft, 905 F.3d at 603 (quoting *Schwarzenegger*, 374 F.3d at 802). This "minimum contacts test 'ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.'"

Freestream Aircraft, 905 F.3d at 603 (quoting *Burger King Corp.*

v. Rudzewicz, 471 U.S. 462, 475 (1985)).

“‘The plaintiff bears the burden of satisfying the first two prongs of the test.’” *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1068–69 (9th Cir. 2017) (quoting *Schwarzenegger*, 374 F.3d at 802). “If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state.” *Schwarzenegger*, 374 F.3d at 802. “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be reasonable.” *Schwarzenegger*, 374 F.3d at 802 (quoting *Burger King*, 471 U.S. at 476–78). *See also Axiom Foods*, 874 F.3d at 1068–69 (“If the plaintiff meets [its] burden, ‘the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable.’” (quoting *Burger King*, 471 U.S. at 476–78))).

To evaluate reasonableness, we use a seven-factor balancing test that weighs: (1) the extent of the defendant’s purposeful interjection into the forum state’s affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief; and (7) the existence of an alternative forum.

Freestream Aircraft, 905 F.3d at 607 (quotation omitted).

II. Analysis

HTH and Eaze move to dismiss the claims against them in Plaintiff's First Amended Complaint on the ground that Plaintiff has not made a sufficient *prima facie* showing that satisfies the test for specific jurisdiction. Plaintiff, in turn, alleges HTH and Eaze have sufficient contacts with Oregon to establish that this Court has specific jurisdiction over them.

As noted, for purposes of determining whether a court has specific jurisdiction over a defendant, the court must consider the factors set out in *Freestream Aircraft*. When a plaintiff "fails to satisfy [any] of [the] prongs, personal jurisdiction is not established in the forum state." *Schwarzenegger*, 374 F.3d at 802.

A. Purposeful Availment

"[A] purposeful availment analysis is most often used in suits sounding in contract." *Freestream Aircraft*, 905 F.3d at 605. "A showing that a defendant purposefully availed himself of the privilege of doing business in a forum state typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract there." *Id.* See also *Burger King*, 471 U.S. at 475-76 (A court has specific jurisdiction over a defendant when "he deliberately engaged in significant activities within a State or has created continuing obligations between himself and residents of the forum.").

HTH and Eaze assert they have not had sufficient contacts with Oregon to satisfy the purposeful-availment prong of the specific-jurisdiction test because they did not have a presence in Oregon and did not undertake activities directed at Oregon. Specifically, HTH and Eaze point out that Plaintiff does not allege and is unable to establish that either HTH or Eaze is an Oregon corporation, is registered to do business in Oregon, is headquartered in Oregon, or is actually doing business in Oregon. HTH is a California dispensary registered and headquartered in California, and Eaze is a Delaware corporation that does business in California. David Adams, Eaze's Vice President of Payments and Litigation, testifies in his Declaration that HTH is "licensed only in Oakland and San Francisco [and] could not, and never did, operate outside of California." Adams Decl. at ¶ 6. Adams also testifies neither Eaze nor HTH entered into any contract with Plaintiff. Adams Decl. at ¶¶ 4,7. The record reflects the only contact between Oregon and any Defendant are the Media Authorizations signed by Plaintiff, an Oregon corporation, and ByProxie, a Delaware corporation with its principal place of business in California.

Plaintiff concedes HTH and Eaze did not have direct contact with Oregon. Plaintiff, however, asserts its allegations that "HTH . . . appointed ByProxie to arrange and execute an advertising campaign"; "[o]n information and belief, ByProxie was

duly authorized to sign contracts on behalf of HTH"; and that ByProxie entered into six Media Authorizations with Plaintiff are sufficient to establish that HTH, via ByProxie, "availed [itself] of the privilege of doing business in" Oregon. Plaintiff also asserts its allegations that "[o]n information and belief Eaze's acquisition of HTH included its . . . liabilities, including the liability for the media campaigns" or, in the alternative, that Eaze has "subsequently used HTH's assets to continue the business of HTH and, as such, is liable for HTH's liabilities under the doctrine of successor liability" are sufficient to establish that Eaze, through HTH, "availed [itself] of the privilege of doing business in" Oregon.

HTH and Eaze point out that Plaintiff does not plead any facts to support its allegation that HTH appointed ByProxie to arrange and to execute an advertising campaign or that ByProxie was authorized to sign contracts on behalf of HTH. Plaintiff also has not produced any evidence of a contract or agreement between HTH and ByProxie. As noted, the Media Authorizations indicate only that ByProxie "may be acting as agent to an advertising customer (Advertiser), and that *if so*, Advertiser shall guarantee [ByProxie's] payment of all charges, expenses and costs arising out of all contracts and/or schedules with OOH owners." FAC Exs. A at 8, B at 3, C at 7, D at 8, E at 9, F at 4 (emphasis added). The Media Authorizations do not

name any entities other than ByProxie and Plaintiff, and they are not signed by any other party. In similar circumstances courts have concluded the plaintiffs did not establish an agency relationship. See, e.g., *E2 Venture Partners v. RSE Ventures*, No. CV 19-3648 MRW, 2019 WL 6448947, at *3 (C.D. Cal. Sept. 3, 2019) ("The text of the written agreement . . . does not mention [the party seeking dismissal] as a party or signatory to the deal," and the allegations "couched in the shielding information-and-belief language . . . are far too cursory and vague to establish an agency relationship that could possibly bind" that party to the contract."); *North v. Samsung SDI Am., Inc.*, No. 5:19-cv-05621-EJD, 2020 WL 1984020, at *4 (N.D. Cal. April 27, 2020) ("Plaintiff's allegations are based entirely on information and belief and consist of nothing more than boilerplate legal terms and phrases. Plaintiff does not allege even a single fact to support the broad allegations of agency."); *Sass v. Or. Dep't of Corr.*, No. 3:17-cv-00983-JE, 2017 WL 7038414, at *1 (D. Or. Dec. 12, 2017) ("[C]onclusory allegations, without more, are insufficient to defeat a motion to dismiss for failure to state a claim."). In addition, courts are not required to accept as true legal conclusions that are set out as factual allegations. See, e.g., *Bullseye Glass Co. v. Brown*, 366 F. Supp. 3d 1190, 1194 (D. Or. 2019) (a court need not "credit the plaintiff's legal conclusions that are couched as factual allegations"); *Mindlab*

Media, LLC v. LWRC Intern. LLC, No. CV 11-3405 CAS (FEMX), 2012 WL 386695, at *4 (C.D. Cal. Feb. 6, 2012) (disregarding legal conclusions of agency that are unsupported by facts and granting motion to dismiss); *Malletier v. The Flea Mkt, Inc.*, No. C 09-01062 CW, 2009 WL 1625946, at *3 (N.D. Cal. June 10, 2009) (granting motion to dismiss on the ground that “blanket assertions [of agency] do not provide Defendant with the requisite fair notice of the factual grounds on which the claim rests”).

In *Williams v. Yamaha Motor Company*, 851 F.3d 1015 (9th Cir. 2017), the Ninth Circuit reviewed the sufficiency of agency allegations in the context of a challenge to the court’s specific jurisdiction after the Supreme Court’s decision in *Daimler AG v. Bauman*. The Ninth Circuit noted in *Williams* that when “*Daimler* voided our agency approach for imputing contacts for the purpose of general jurisdiction it left open the question of whether an agency relationship might justify the exercise of specific jurisdiction.” *Williams*, 851 F.3d at 1023 (citing *Daimler*, 134 S.Ct. at 759 n.13). Notwithstanding *Daimler*, the Ninth Circuit “assum[ed] . . . some standard of agency continue[d] to be relevant to the existence of specific jurisdiction.” *Id.* The Ninth Circuit concluded specific jurisdiction may be based on an agent’s contacts with the forum state only when the “agent act[s] on the principal’s behalf and subject to the principal’s

control.” *Williams*, 851 F.3d at 1024 (quotations and citations omitted) (emphasis added). Specifically, the court pointed out that

[f]undamental tenets of agency theory require that an agent “act on the principal’s behalf and subject to the principal’s control.” Restatement (Third) Of Agency § 1.01 (2006); see also *Batzel v. Smith*, 333 F.3d 1018, 1035 (9th Cir. 2003) (“Agency requires that the principal maintain control over the agent’s actions”). Accordingly, under any standard for finding an agency relationship, the [principal] must have the right to substantially control its [agent’s] activities. See, e.g., *Unocal*, 248 F.3d at 926; *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1232 (9th Cir. 2013).

Williams, 851 F.3d at 1024-25 (emphasis added). The Ninth Circuit noted the appellants in *Williams* “neither allege[d] nor otherwise show[ed] that [the alleged principal] had the right to control [the alleged agent’s] activities in any manner at all.” *Id.* at 1025. The Ninth Circuit stated:

Appellants do allege that “Defendants . . . were the agents or employees of each other and were acting at all times within the course and scope of such agency and employment . . . and are legally responsible because of their relationship with their co-Defendants.” This is, however, a conclusory legal statement unsupported by any factual assertion regarding YMC’s control over YMUS (or regarding any other aspect of the parent-subsidiary relationship), and we accordingly do not credit it.

Id. at 1025 n.5 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Ninth Circuit concluded “even assuming the validity of some formulation of agency analysis such that a subsidiary’s

contacts could be attributed to its parent, Appellants failed to establish specific jurisdiction over YMC.” *Id.* at 1025.

In *Juniper Networks, Incorporated v. Andrade* the court discussed the effect of the Ninth Circuit’s decision in *Williams* regarding specific-jurisdiction analysis in the context of an alleged agency relationship. In *Juniper* the plaintiff entered into a contract with a corporation (HTBase) and several of its shareholders including HTBase’s founder and Chief Executive Officer, Bruno Andrade. No. 20-CV-02360-BLF, 2020 WL 5630023, at *1 (N.D. Cal. Sept. 21, 2020). Eventually the plaintiff brought an action for breach of contract against five of the shareholders, including Andrade, based on alleged misrepresentations by Andrade. Four of the defendants (foreign defendants) moved to dismiss the plaintiff’s claim against them based on lack of personal jurisdiction. Specifically, the foreign defendants asserted the court did not have general jurisdiction over them because they

do not own property or bank accounts in California, do not pay taxes in California, are not licensed or registered to do business in California, have no employees in California, do not travel to California for business, and do not have regular contacts with California or California residents as part of their normal business operations.

Id., at *3. The foreign defendants also asserted the court did not have specific jurisdiction over them because “they did not have communications or other dealings directly with [the

plaintiff] or any of its representatives in the United States in connection with the HTBase acquisition, and . . . they executed the [contract] in Canada . . . and Brazil.” *Id.*, at *4. The plaintiff conceded the court did not have general jurisdiction over the foreign defendants, but the plaintiff asserted the court had specific jurisdiction because the foreign defendants “purposefully availed themselves of the privilege of doing business in California through Andrade, asserting that Andrade acted as the Foreign Defendants’ agent both before and after execution of the [contract].” *Id.* “Under [its] agency theory, [the plaintiff] contend[ed] . . . Andrade’s contacts with California may be imputed to the Foreign Defendants.” *Id.* The court noted it was “not persuaded that the [contract’s] designation of Andrade as the Vendors’ Representative satisfies the *Williams* requirements for agency” when the plaintiff pled only that

Defendants, and each of them, were partners, joint venturers, agents, employees, alter egos, and/or representatives of each other in doing the things herein alleged and, in doing so, were acting within the scope of their respective authorities as agents, employees, and representatives, and are jointly and severally liable to [the plaintiff] . . . [and] [t]his Court also has jurisdiction over all Defendants because, upon information and belief, they engaged in intentional conduct, either directly or through agents, directed at [the plaintiff] that caused harm to [the plaintiff] in California.

Id., at *5. The court noted “the [contract] certainly

establishes . . . Andrade acted on the Vendors' behalf in his role as Vendors' Representative, [however,] it does not establish that Andrade was subject to the Vendors' control." *Id.*, at *6. The court concluded "[a]bsent some evidence that the Vendors . . . exercise[d] control over the manner in which Andrade fulfilled his obligations as Vendors' Representative, . . . [the plaintiff] has not demonstrated . . . Andrade's contacts with California may be imputed to the Foreign Defendants." *Id.* The court, therefore, concluded the plaintiff "failed to meet its burden of showing that the Foreign Defendants purposefully availed themselves of the privilege of doing business in" the forum state. *Id.*

Unlike the plaintiff in *Williams*, Plaintiff here fails to allege any facts to support its allegation that ByProxie was HTH's agent or that ByProxie was authorized to bind HTH to a contract. Plaintiff does not plead facts to support its allegation that ByProxie acted on HTH's behalf. In addition, like the plaintiffs in *Juniper* and *Williams*, Plaintiff here has not pled HTH had a right to control ByProxie's actions. Plaintiff also fails to plead facts to support its allegation that Eaze assumed HTH's liabilities or would be liable as HTH's successor. The Court, therefore, concludes Plaintiff's allegations that ByProxie acted as HTH's agent are insufficient to plead purposeful availment by HTH or Eaze because Plaintiff

has not pled any facts on which the Court could find HTH and, in turn, Eaze could be liable to Plaintiff as agents, guarantors, or parties to Plaintiff's Media Agreements with ByProxie. See *Drury v. Assisted Living Concepts, Inc.*, 245 Or. App. 217, 224 (2011) ("[E]ven when, unlike here, a third party is the subject of a contract and explicitly benefits from it, there must still be a manifested assent to be bound by the agreement because to hold otherwise is to allow contracting parties to alter the rights of a third party . . . without regard for whether the third party deems that consideration to be an adequate exchange for the contractual obligations.") (quotations omitted)).

B. Arising Out Of or Relating to Defendants' Forum Contacts

"Under the second prong of [the specific] jurisdiction analysis, the plaintiff's claim must be one which arises out of or relates to the defendant's forum-related activities." *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007). When "determining whether [a plaintiff's] claims arise out of [a defendant's] forum-related conduct, the Ninth Circuit follows the 'but for' test." *Id.* (citation omitted). Thus, Plaintiff here "must show [it] would not have suffered an injury 'but for' [HTH and Eaze's] forum-related conduct." *Id.* As noted, Plaintiff does not identify any activity of HTH or Eaze in Oregon that gave rise to Plaintiff's alleged injury.

Accordingly, the Court concludes on this record that

Plaintiff's claims against HTH and Eaze do not arise out of nor are they related to any activity between Plaintiff and HTH or Eaze in Oregon.

C. Reasonable and Fair to Assert Jurisdiction.

Because the Court concludes Plaintiff has not met its burden as to **either of** the first two factors required to establish specific jurisdiction over HTH and Eaze, the Court need not address the third factor. *See, e.g., Schwarzenegger*, 374 F.3d at 802 ("If the plaintiff fails to satisfy either of the[] [first two] prongs, personal jurisdiction is not established in the forum state.").

CONCLUSION

For these reasons, the Court **GRANTS** the Motion (#20) of Eaze Technologies Inc. and Hometown Heart to Dismiss Plaintiff's First Amended Complaint and **DISMISSES** Plaintiff's First Amended Complaint as to HTH and Eaze **without prejudice**.

The Court **GRANTS** Plaintiff leave to file a Second Amended Complaint **no later than March 25, 2021**, to amend its agency assertions consistent with this Opinion and Order to the extent that Plaintiff is able to do so. If Plaintiff does not file a Second Amended Complaint by March 25, 2021, this matter will proceed on Plaintiff's First Amended Complaint only as to

Defendants ByProxie and Herban.

IT IS SO ORDERED.

DATED this 26th day of February, 2021.

/s/ Anna J. Brown

ANNA J. BROWN
United States Senior District Judge